



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 20, 2013

Ms. Julie P. Doshier
Counsel for the City of Highland Village
Nichols, Jackson, Dillard, Hager & Smith, L.L.P.
1800 Lincoln Plaza
500 North Akard Street
Dallas, Texas 75201

OR2013-04643

Dear Ms. Doshier:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 481812 (File Reference # 58898; 2013-180).

The City of Highland Village (the "city"), which you represent, received a request for a specified police report and a named individual's personnel files. You inform us the city is making some of the requested information available to the requestor. You claim Exhibit B is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.108, 552.117, 552.130, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note Exhibit B includes a completed report subject to section 552.022(a)(1) of the Government Code, which provides:

Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). You seek to withhold the submitted information under section 552.103 of the Government Code. However, section 552.103 is discretionary in nature and does not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, S.W.3d 69, 475-6 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 665 at 2n.5 (2000) (discretionary exceptions generally). Thus, the city may not withhold the completed report subject to section 552.022(a)(1), which we have marked, under section 552.103. However, we will address your argument under section 552.103 for the information in Exhibit D that is not subject to section 552.022(a)(1). You also raise section 552.108 of the Government Code for some of the completed report subject to section 552.022(a)(1). Therefore, we will address your claim under section 552.108 for this information. Further, because sections 552.102, 552.117, and 552.130 of the Government Code can make information confidential under the Act, we will address your arguments under these sections for all of the information in Exhibit B.

We first address your arguments for the information in Exhibit B that is not subject to section 552.022(a)(1). Section 552.103 of the Government Code provides in part as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order

for information to be excepted from disclosure under section 552.103. We note contested cases conducted under the Administrative Procedure Act (the "APA"), chapter 2001 of the Government Code, are considered litigation for purposes of section 552.103. *See* Open Records Decision No. 588 at 7 (1991).

You represent the named individual is a party to a workers' compensation claim pending before the Texas Department of Insurance Division of Workers' Compensation (the "department") regarding an injury sustained during the course of his employment with the city. You inform us, and provided documentation showing, this claim was pending prior to the city's receipt of the request for information. You also inform us the information at issue is related to the claim. We note contested cases before the department are generally governed by the APA. Labor Code § 410.153. Based on your representations and our review, we find the city has established that litigation was pending on the date it received the present request. Furthermore, we find the information at issue relates to the pending litigation. Accordingly, we conclude the city may withhold the information in Exhibit B that is not subject to section 552.022(a)(1) of the Government Code, which we have marked, under section 552.103 of the Government Code.¹

We note, however, that once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, any information that has either been obtained from or provided to the opposing party in the litigation is not excepted from disclosure under section 552.103(a) and must be released. Further, the applicability of section 552.103(a) ends once the litigation has been concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We next address your arguments for the completed report in Exhibit B that is subject to section 552.022(a)(1). Section 552.108(b)(2) of the Government Code excepts from disclosure "[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution . . . if . . . the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]" Gov't Code § 552.108(b)(2). A governmental body claiming section 552.108(b)(2) must demonstrate the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.301(e) (governmental body must provide comments explaining why exceptions raised should apply to information requested). You inform us the information you have marked under section 552.108(b)(2) pertains to a criminal investigation that did not result in a conviction or deferred adjudication. Based on your representation and our review, we agree section 552.108(b)(2) is applicable to this

¹As our ruling for this information is dispositive, we need not address your remaining arguments against its disclosure.

information. Thus, the city may withhold the information you have marked under section 552.108(b)(2) of the Government Code.²

Section 552.102(a) of the Government Code excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” *See id.* § 552.102(a). The Texas Supreme Court held that section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). Thus, under *Texas Comptroller*, section 552.102(a) is applicable to the birth date of an employee of a governmental body in a record maintained by her or his employer in an employment context. In this instance, the birth date of the city employee you have marked is contained in a police report, which the city is not holding in an employment context. Therefore, we conclude the city may not withhold the birth date you have marked under section 552.102(a) of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See Gov't Code* § 552.117(a)(1). We note, however, section 552.117 applies only to information held by a governmental body in an employment context. In this instance, the information of the city employee you have marked under section 552.117(a)(1) is contained in a police report, which the city is not holding in an employment context. Thus, we conclude the city may not withhold the information at issue under section 552.117(a)(1) of the Government Code.

Section 552.130(a)(1) of the Government Code provides that information relating to a motor vehicle operator's or driver's license or permit issued by any agency of this state or another state or country is excepted from public release. *See id.* § 552.130(a)(1). Accordingly, the city must withhold the driver's license numbers you have marked, and the additional driver's license information we have marked, under section 552.130(a)(1) of the Government Code.

In summary, the city may withhold the information in Exhibit B that is not subject to section 552.022(a)(1) of the Government Code, which we have marked, under section 552.103 of the Government Code. The city may withhold the information you have marked in the completed report in Exhibit B that is subject to section 552.022(a)(1) of the Government Code under section 552.108(b)(2) of the Government Code. The city must withhold the information marked in the completed report under section 552.130(a)(1) of the

²As our ruling for this information is dispositive, we need not address your remaining arguments against its disclosure.

Government Code. The remaining information in Exhibit B must be released pursuant to section 552.022(a)(1) of the Government Code.³

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,



Kenneth Leland Conyer
Assistant Attorney General
Open Records Division

KLC/bhf

Ref: ID# 481812

Enc. Submitted documents

c: Requestor
(w/o enclosures)

³We note the information being released contains the requestor's driver's license information which is generally confidential under section 552.130 of the Government Code. However, because section 552.130 protects personal privacy, the requestor has a right to his own information under section 552.023 of the Government Code. *See* Gov't Code § 552.023(a); Open Records Decision No. 481 at 4 (1987). We note section 552.130(c) of the Government Code authorizes a governmental body to redact information protected by section 552.130(a)(1) without the necessity of requesting a decision under the Act. *See* Gov't Code § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e). Thus, if the city receives another request for this same information from a person who does not have such a right of access, section 552.130(c) authorizes the city to redact this driver's license information.